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JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 259.

THE REPUBLIC OF COLOMBIA, APPELLANT,

vs.

THE CAUCA COMPANY AND THE COLOMBIAN CONSTRUCTION AND IMPROVEMENT COMPANY, APPELLEES.

Brief for Appellant in Opposition to Motion to Dismiss.

WM. G. JOHNSON,
Counsel for Appellant.

LAW REPORTER PRINT, WASHINGTON, D. C.

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STATEMENT.

This is a motion to dismiss an appeal to this court from a decree of the Circuit Court of Appeals for the Fourth Circuit (Rec. p. 96), affirming a decree of the Circuit Court for the District of West Virginia (Rec. p. 88), which appeal to this court was regularly prayed by the appellant (Rec. p. 97) and allowed by the Circuit Court of Appeals (Rec. p. 101).

The ground of the motion to dismiss is "want of jurisdiction" in this court:

> "Because the judgment or decree from which the said appeal purports to have been taken is a judgment or decree of the United States Circuit Court of Appeals for the Fourth Circuit, which, under the Constitution and Laws of the United States, is final" (Motion to Dismiss, p. 1).

The ground of jurisdiction of the United States Circuit Court in this case is thus stated in the bill (Rec. pp. 1–2):

> "The Republic of Colombia, a body corporate and politic under the law of nations, and a foreign state within the meaning of the Constitution of the United States, brings this its bill against the 'Cauca Company' and the 'Colombian Construction and Improvement Company,' two certain commercial corporations created and existing under the laws of one of the United States of America, to wit: the State of West Virginia, as appears by their certificates of incorporation hereinafter mentioned.
>
> And your orator shows that this complainant is a foreign state at peace with the United States, and holding diplomatic relations therewith, and that its accredited diplomatic representative duly recognized and received as such by the United States is General Julio Rengifo, chargé d'affaires, *ad interim*, as will more fully appear by the certificate of the Department of State of the United States, which it is prayed may be taken and read as part of this bill, and which is filed herewith, a printed copy thereof being hereunto annexed and marked "Complainant's Exhibit No. 1."

The answer of the defendants states (Rec. p. 16):

> "They admit that the complainant, The Republic of Columbia, is a body politic and a sovereign and foreign State at peace with the United States and having diplomatic relations therewith; and also that these defendants are corporations created and existing under the laws of the State of West Virginia; and also that the said Don Julio Rengifo was at the time when said bill of complaint was filed chargé d'affaires of the complainant, representing said Republic at Washington."

The amount in controversy is shown by the decree of the Circuit Court to exceed three hundred thousand dollars, besides interest and costs.

It is not deemed to be either necessary or proper to bur-

den the court with a statement of the facts in the case, since they can throw no light upon the question of the jurisdiction of this court, and the case upon its merits is not now before the court.

The only ground of jurisdiction in this court claimed by appellant is that which was set up and admitted as the ground of jurisdiction in the Circuit Court, namely, that the complainant, appellant here, is a *foreign State* under the law of nations and within the meaning of the Constitution of the United States, and that the controversy is one between citizens of a State, the appellees, and this foreign State.

ARGUMENT.

The contention of counsel for appellees, in their motion to dismiss is that the sixth section of the act of March 3, 1891 (26 Stats. 828), makes the decree of the Circuit Court of Appeals final.

The words "*foreign state*" although used in the Constitution in contradiction to "citizens or subjects" of a foreign state do not occur in the act of March 3, 1891, but the claim of appellees is that the word "aliens" embraces not only the "citizens or subjects" of a "foreign state," but also the foreign state itself (Brief, pp. 8–12).

"Aliens" and "foreign states" are admittedly not identical.

The Constitution describes them separately, without using the word "alien," by the phrase "foreign states, citizens, or subjects" (Art. III, Sec. 2), and Mr. Justice Story, in his Commentaries, recognizes the distinction in treating that clause, saying, with reference to a "foreign state" (Sec. 1699):

> "In regard to controversies between an American and a *foreign state*, it is obvious that the suit *must*, on the one side at least, *be wholly voluntary. No foreign*

> *state can be compelled* to become a party, plaintiff, or defendant in any of our tribunals. If, therefore, it chooses to consent to the institution of any suit, it is *its consent alone* which *can give effect to the jurisdiction of the court.* It is certainly desirable to furnish some peaceable mode of appeal in cases where any controversy may exist between an American and a foreign state sufficiently important to require the grievance to be redressed by any other mode than through the instrumentality of negotiations."

The "citizens or subjects" of a "foreign state," however, he classifies as "aliens" saying (Sec. 1700):

> "The inquiry may here be made *who are to be deemed aliens* entitled to sue in the courts of the United States? The general answer is, *any person who is not a citizen of the United States.*"

In the case of Picquet *vs.* Swan, 5 Mason, 35, Mr. Justice Story judicially construes this phrase in the Constitution, saying (p. 39):

> "The Constitution of the United States has, among other things, extended the judicial power to controversies between citizens of different states, and between citizens of a state and *foreign citizens or subjects.* The actual legislation of Congress has not as yet been co-extensive with this constitutional boundary of jurisdiction. The judiciary act of 1789, Ch. 20, provides, 'that the Circuit Courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature where the matter in dispute, exclusive of costs, exceeds 500 dollars, and the United States are plaintiffs, or petitioners; *or an alien is a party; or the suit is between a citizen of the state, where the suit is brought, and a citizen of another state.*' As to citizens, therefore, there exists no jurisdiction, unless either the plaintiff or the defendant is a citizen of the state where the suit is brought. As to *aliens, by which must be understood,* in the language of the Constitution, '*a foreign citizen or subject,*' the jurisdiction is in all cases given, where an *alien* is a party."

In the case of the Sapphire, 11 Wall. 164, the jurisdiction of the court to entertain a suit by a foreign sovereign (the Emperor of the French) was denied by counsel for the appellant, but this court sustained the jurisdiction upon the sole ground that the foreign sovereign was a *foreign state*. These words the court, in its opinion, italicizes, but in the whole course of the discussion it does not even allude to the fact that Napoleon III was an *alien*. In disposing of the question Mr. Justice Bradley says (p. 167):

> "The first question raised is as to the right of the French Emperor to sue in our courts. On this point *not the slightest difficuly exists.* A *foreign sovereign*, as well as any *other foreign person*, who has a demand of a civil nature against any person here, may prosecute it in our courts. To deny him this privilege would manifest a want of comity and friendly feeling. Such a suit was sustained in behalf of the King of Spain in the third circuit by Justice Washington and Judge Peters in 1810. The Constitution expressly extends the judicial power to controversies between a State, or citizens thereof, and *foreign States*, citizens, or subjects, without reference to the subject-matter of the controversy. Our own government has largely availed itself of the like privilege to bring suits in the English courts in cases growing out of our late civil war. Twelve or more of such suits are enumerated in the brief of the appellees, brought within the last five years in the English law, chancery, and admiralty courts. There are numerous cases in the English reports in which suits of foreign sovereigns have been sustained, though it is held that a sovereign can not be forced into court by suit."

Referring to the objection that the deposition of Napoleon III had the effect of abating the suit, Mr. Justice Bradley says (pp. 168–9):

> "The next question is, whether the suit has become abated by the recent deposition of the Emperor

Napoleon. We think it has not. The reigning sovereign represents the *national sovereignty*, and that sovereignty is continuous and perpetual, residing in the proper successors of the sovereign for the time being. Napoleon was the owner of the Euryale, *not as an individual, but as sovereign of France.* This is substantially averred in the libel. On his deposition the sovereignty does not change, but merely the person or persons in whom it resides. *The foreign state* is the true and real owner of its public vessels of war. The reigning Emperor, or National Assembly, or other actual person or party in power, is but the agent and representative of the *national sovereignty.* A change in such representative works no change in the national sovereignty or its rights. The next successor recognized by our Government is competent to carry on a suit already commenced and receive the fruits of it. A deed to or treaty with a sovereign as such enures to his successors in the government of the country. If a substitution of names is necessary or proper it is a formal matter, and can be made by the court under its general power to preserve due symmetry in its forms of proceeding. No allegation has been made that any change in the real and substantial ownership of the Euryale has occurred by the recent devolution of the sovereign power. The vessel has aways belonged and still belongs to the *French nation.*"

Thus it is seen that throughout the discussion of the question of jurisdiction this court adheres to the idea that its jurisdiction rested upon the character of the party as a "*foreign state*" and no reference is made to the personal alienage of the Emperor.

In the case of Cherokee Nation *vs.* Georgia, 5 Pet. 1, this court had occasion to construe the term "foreign state" in the third article of the Constitution and, through Chief Justice Marshall, held that it was synomymous with "foreign *nation*" (5 Pet. pp. 15, 18).

In the case of Stone *vs.* South Carolina, 117 U. S. 430, this court pointed out the obvious distinction between a

State and a *citizen* of a State. In that case the State of South Carolina had brought suit in the State court against Stone and his partner, Corbin, for money claimed to be due from them to the State. Stone claimed the right to remove the case into the United States court on the ground that he, Stone, was a citizen of New York. The State court denied his right to remove the case and proceeded to judgment.

In sustaining the action of the State court Mr. Chief Justice Waite delivering the opinion of this court said (p. 433):

> It is not pretended that the suit was one arising under the Constitution or laws of the United States, and it *certainly is not one between citizens of different States.* The State of South Carolina is the sole plaintiff, and the defendants are citizens, one of South Carolina and the other of New York. The cause of action is joint, and only one of the defendants petitions for removal. There is no statute which authorizes the removal of a suit between a State and citizens on the ground of citizenship, for *a State can not in the nature of things be a citizen of any State.*"

In the case of The King of Spain *vs.* Oliver, 2 Wash. C. C. 429, cited by appellees (Brf. p. 8), two rules were obtained by the defendant; one for the plaintiffs' attorney to file his warrant of attorney; the other that the case be stayed, because the plaintiff was not qualified to sue in the court.

The objection to the plaintiff in the suit made by counsel for defendant, as stated in the report, is (p. 431):

> "The municipal courts of one country can not entertain jurisdiction of a suit brought by a foreign sovereign, more especially *one who is not acknowledged by the government of the county where the suit is brought;* and still stronger, where the sovereign in whose name the suit is brought *is not in possession of his government.*"

In disposing of this question the court said (p. 432):

> "Without going through the English cases which have been cited, it is sufficient to observe, that the

> Constitution of the United States gives jurisdiction to the courts of the United States in cases where foreign states are parties; and the judicial act gives jurisdiction to the Circuit Courts in all cases between aliens and citizens. Whether this suit can be supported, if prosecuted *in the name of the King of Spain generally*, or whether *Ferdinand VII* can support the action *before he is acknowledged by our Government* are questions not proper to be decided on motion."

The report of the case is too meagre, it is submitted, to be treated as authority for the proposition that the court confounded as synonymous terms the words "foreign state" in the Constitution and "alien" in the judiciary act.

The inference is, rather, that the court meant to indicate that if the plaintiff was sovereign and sued in that quality the jurisdiction might be invoked as in behalf of a foreign state and that if he was not sovereign and sued as a private person, his alienage would still support the jurisdiction.

Such a construction of the opinion makes it directly responsive to the defendant's objection, which seemed to relate to the question of *whether Ferdinand was king* and not whether the court had jurisdiction of a suit by a foreign state.

In the acts of Congress approved March 3, 1875 (18 Stat. 470), March 3, 1877 (24 Stat. 552), and of August 13, 1888 (25 Stat. 433), regulating the jurisdiction of the Circuit Courts Congress uses the language of the Constitution, "between citizens of a state and *foreign states, citizens or subjects.*"

So that the jurisdiction of the Circuit Court, in this case, was not based upon any legislative confounding of foreign states with alien citizens or subjects, but was based upon the words of the Constitution.

The contention of appellees that Congress, in the language of the act of March 3, 1891 (26 Stats. 826), confounded "*foreign states*" with "*aliens*" and intended to deprive this court of its appellate jurisdiction over controversies between citizens of a State and foreign states, by the use of the word

"aliens," is contrary to the rule of construction of that statute announced by this court.

The great object of the statute was to relieve this court of the rapidly accumulating cases which were swelling the docket to enormous and unmanageable proportions and the remedy designed was to eliminate from its appellate jurisdiction the class of cases which were causing the difficulty.

The table of cases submitted to the Senate by Mr. Evarts in the debate upon the act (Cong. Rec., 51st Cong., 1st Sess., Vol. 21, Part 10, p. 10221), shows that in over seventy-five per cent of the cases then on the docket of this court, the jurisdiction was dependent upon diverse *citizenship* of the parties.

In commenting upon the proposed law Mr. Evarts said in the debate in the Senate (Cong. Rec., 51st Cong., 1st Sess., Vol. 21, Part 10, p. 10222):

> "Now, *what are those cases* that we say *shall receive their final determination in this new court?* They are various cases that turn, not upon Federal jurisprudence, not upon Federal subjects-matter, but upon the *citizenship* of the plaintiff being in one State and a defendant in another, or *aliens abroad* and of citizens in our own States."

The business of this court was not congested by the accumulation of cases brought by "foreign states," so far as counsel has been able to discover in the reports of decisions by this court. Indeed the case of the Sapphire, 11 Wall. 164, is the only case in this court in which a "foreign state" was a party prior to the passage of the Circuit Court of Appeals Act.

In the case of United States *vs.* American Bell Telephone Co., 159 U. S. p. 548, this court, speaking by Mr. Chief Justice Fuller, said (p. 549):

> "The Supreme Court has appellate jurisdiction, under the Constitution, in all cases to which the judicial power extends (other than those in respect to which it has original jurisdiction) 'with such excep-

tions and under such regulations as the Congress shall make.' It was early held that in the passage of the judiciary act of 1789, Congress was executing the power of making exceptions to the exercise of appellate jurisdiction, and that the affirmative description of the cases to which the appellate power extended was to be understood as implying a negative on the exercise of such appellate power as was not comprehended within it, but that as this restriction rested on implication founded on the manifest intent of the legislature, it could be sustained only when that manifest intent appeared. Durousseau *vs.* United States, 6 Cranch, 307.

Where the appellate jurisdiction is described in general terms so as to comprehend the particular case, no presumption can be indulged of an intention to oust or to restrict such jurisdiction; and any statute claimed to have that effect must be examined *in the light of the objects of the enactment, the purposes it is to serve and the mischiefs it is to remedy*, bearing in mind the rule that the operation of such a statute must be restrained within narrower limits than its words import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never intended to include in it."

(p. 551): " The primary object of the act of March 3, 1891, Ch. 517, as stated in American Construction Company *vs.* Jacksonville Railway Company, 148 U. S. 372, 382, ' Well known as a matter of public history, manifest on the face of the act, and judicially declared in the leading cases under it, was *to relieve this court of the overburden of cases and controversies arising from the rapid growth of the country, and the steady increase of litigation*; and, for the accomplishment of this object, to transfer a large part of its appellate jurisdiction to the Circuit Courts of Appeals thereby established in each judicial circuit, and to distribute between this court and those, according to the scheme of the act, the entire appellate jurisdiction from the circuit and district courts of the United States.' "

It is submitted, with confidence, that it can not be maintained, with reference to the Circuit Court of Appeals act, that "the objects of the enactment, the purposes it is to serve and the mischiefs it is to remedy" would in any wise have been subserved by relieving the court of a branch of its appellate jurisdiction which had brought to it only one case in a century; while the manifest impolicy of denying to a foreign state, suing in the courts of the United States, the right to be heard in this court, justifies the application of the language of Mr. Chief Justice Fuller, in United States *vs.* American Bell Telephone Company, *supra.*

> (p. 554): "That there is nothing in the objects sought to be attained and the mischiefs sought to be remedied by the act which furnishes foundation for the belief that Congress manifestly intended to place a limitation on the appellate jurisdiction of this court in a case such as this."

Before the hearing of this case in the court below a petition for a writ of certiorari to bring the case to this court for final hearing in advance of any hearing in the court below was submitted. This court denied the petition, but without opinion, in accordance with the usual practice in such cases (181 U. S. 619).

In making that application, the undersigned, who was of counsel for petitioner, assumed, without sufficiently careful examination of the statute, that the case was one in which the decree of the Circuit Court of Appeals would be final.

Subsequent examination of the statute satisfied counsel that he was in error in this assumption; that the case was not one in which the decree below would be final, and that the proper mode of review in this court was by appeal, as matter of right, under the statute, and not by certiorari, so that the former course was pursued by him after the decree

below. It may well be that on the application for the certiorari before the hearing below, this court observed, upon inspection, that the case, being a suit by a foreign state, was not one in which the decree below would be final, and for that very reason denied the writ.

It is respectfully submitted that this court has jurisdiction of the case and that the motion to dismiss the appeal should be denied.

WM. G. JOHNSON,
Counsel for Appellant.